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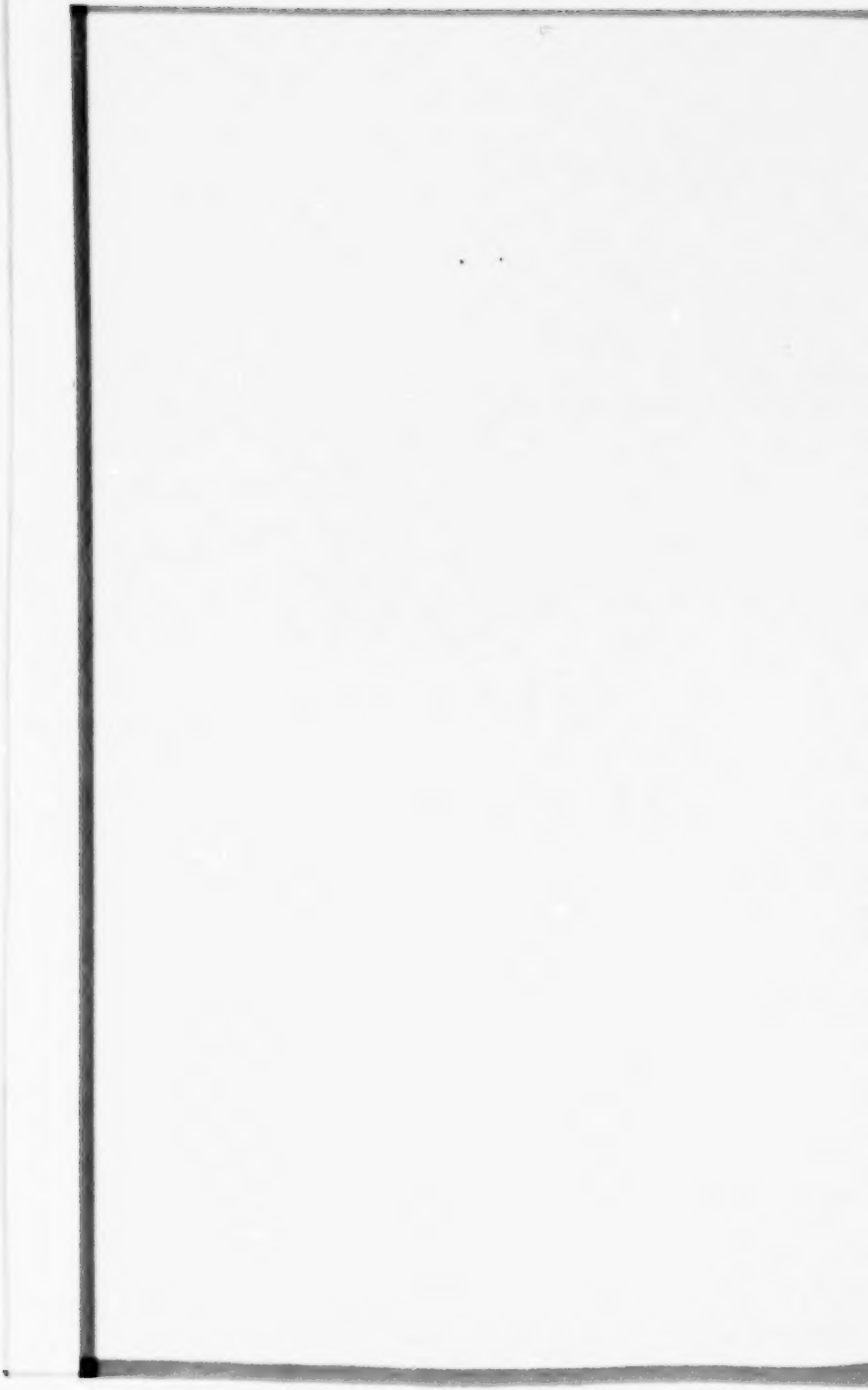

COURT OF APPEALS OF THE STATE OF NEW YORK

OCTOBER TERM, 1946

No. 940

HILL PACKING COMPANY,

Plaintiff-Respondent,

vs.

THE CITY OF NEW YORK, WILLIAM O'DWYER, MAYOR OF THE CITY OF NEW YORK; ISRAEL WEINSTEIN, ACTING COMMISSIONER OF HEALTH AND MEMBER OF THE BOARD OF HEALTH OF THE CITY OF NEW YORK; ROBERT McCURDY MARSH, HAVEN EMERSON, THOMAS M. RIVERS AND DAVID M. HEYMAN, MEMBERS OF THE BOARD OF HEALTH OF THE CITY OF NEW YORK, AND ARTHUR W. WALLANDER, POLICE COMMISSIONER OF THE CITY OF NEW YORK,

Defendants-Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States the plaintiff, Hill Packing Company, submits herewith its statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the order and judgment of the Court of Appeals of the State of New York

entered in this cause on July 23rd, 1946. A petition for appeal is presented to the Chief Judge of the said Court of Appeals herewith on October 18th, 1946.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by appeal the final order and judgment in favor of the validity of the ordinance complained of, entered in this cause, is conferred by Section 237(a) of the Judicial Code, 28 U. S. C., Section 344(a), and 28 U. S. C. A., Section 344(a).

The pertinent provisions of such statute, to the extent relevant here, read as follows:

> "Section 344(a). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

The following decisions sustain the jurisdiction of the Supreme Court to review upon appeal the order and judgment in this case: *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 48 S. Ct. 489; *Jamison* v. *State of Texas*, 318 U. S. 413, 63 S. Ct. 669.

The final order and judgment of the Court of Appeals of the State of New York which is now sought to be reviewed is dated and entered July 23rd, 1946. The application for appeal must be made within 3 months after the entry of said final order and judgment of the Court of Appeals, to wit, July 23rd, 1946. 28 U. S. C. § 350; 28 U. S. C. A. § 350;

Department of Banking, State of Nebraska v. *Pink*, 317 U. S. 264, 63 S. Ct. 233.

Statute Involved

The statute, the validity of which is involved, is Paragraph 4 of Section 327 of the Sanitary Code of the City of New York, as amended (Official Edition of the Sanitary Code of the City of New York published by the Department of Health, City of New York, page 108). Said Section 327 reads as follows:

> "Section 327. *Slaughtering of Horses and Sale of Horseflesh Regulated.*
>
> 1. The business of slaughtering horses shall not be conducted in the City of New York. No horseflesh shall be brought into, transported or held, kept, or offered for sale in said City without a permit therefor issued by the Board of Health, or otherwise than in accordance with the terms of said permit and the regulations of said board. Such permits when issued shall specify 'For Animal Consumption' or 'For Human Consumption.'
>
> 2. No carcass, or part of carcass of a horse shall be brought into the City of New York, or held, kept, sold, offered for sale or given away in said City, until it shall have been inspected and passed as fit for human food by a duly authorized inspector of the United States Department of Agriculture and shall have been marked, stamped or branded as having been so inspected and passed, or, in the case of parts of a carcass, unless such parts shall have been cut from a carcass or part of a carcass which had previously been inspected and passed and so marked, stamped or branded as hereinbefore provided.
>
> 3. Horseflesh shall not be used as an ingredient of or in the preparation of any mixed food intended for human consumption.

4. Horseflesh, whether alone or combined with other ingredients, intended for animal feed shall not be brought into the City of New York, transported, or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horseflesh sold and transported to the New York Zoological Society or the Park Department of The City of New York."

The Issues and Rulings Below

The action herein is for a declaratory judgment declaring that Section 327 of the Sanitary Code of the City of New York, as amended, violates plaintiff's rights and privileges in transporting and vending horseflesh in interstate commerce and that said section is an improper exercise of the police powers, is prohibitory and deprives the plaintiff of equal protection under the laws of the United States and the State of New York; and for a permanent injunction restraining the defendants from enforcing said Section 327 of the Sanitary Code of the City of New York, as amended.

The Federal questions sought to be reviewed were raised in the Court of the first instance by the pleadings. In its complaint plaintiff alleged that it is a foreign corporation organized in the State of Kansas (R., fol. 15); that the plaintiff was engaged in the preparation and sale of horseflesh both for human and animal consumption throughout the States of the United States and elsewhere, and has been and is engaged in interstate and foreign commerce (R., fols. 18, 19); that plaintiff transported from the State of Kansas to the City and State of New York, delivering and selling there horseflesh for use as animal food (R., fols. 21, 22); that plaintiff transported substantial amounts of horseflesh into the City of New York, said horseflesh being prepared under regulation and supervision of the Department

of Agriculture pursuant to United States statutes and regulations (R., fol. 24).

The complaint goes on to allege that horseflesh is a wholesome and nutritious article of food, both for human beings and for animals, and the horseflesh prepared by plaintiff, except meat mixed with ground bone, under the provisions of the Federal laws, have been stamped as fit and wholesome for human and animal consumption, and that such horseflesh is equal to beef in nutritive value (R., fol. 26); that on August 10th, 1943, Section 327 of the Sanitary Code of the City of New York was amended so as to include among its provisions Paragraph 4 set forth hereinabove (R., fols. 28-31); that because of the rules and regulations of the Bureau of Animal Industry of the United States it would be impossible for plaintiff to comply with the requirements of the local law (R., fol. 37); that the enforcement of said Section 327, as amended, would be prohibitory and has already seriously injured plaintiff in its business in interstate commerce between the State of Kansas and the State of New York, and that if enforcement of said section be not enjoined, plaintiff would be irreparably injured (R., fol. 40); that plaintiff's business has been and will be hampered, impeded and partially or wholly destroyed if such section were to be enforced (R., fol. 41); that plaintiff is one of the four largest dealers in horseflesh within the United States and the restriction of its business by enforcement of said Section 327 would cause irreparable injury; that said Section 327 violates plaintiff's rights under Section 8, Article 1 and Section 1, Article 14 of the Constitution of the United States (R., fol. 45); that said ordinance is void because of indefiniteness and because it is prohibitory (R., fol. 47); and that said ordinance is void and unenforceable because it is not a reasonable exercise of the powers of the Board of Health and is arbitrary (R., fol. 48).

These allegations in the complaint were put in issue by the denials contained in the defendants' answer (R., fols. 53-63). The answer also contained affirmative defenses alleging that said ordinance was designed to regulate the sale of horseflesh in the public interest (R., fol. 60); that it is the only law protecting the public from fraud in the sale of horseflesh (R., fol. 60); that said section was valid and necessary for the protection of the health and welfare of the residents of the City of New York and is not in conflict with any superior law (R., fol. 62).

Prior to the trial of this action application was made for a temporary injunction to restrain the enforcement of the ordinance pending final determination of the action. That application was granted. The opinion therein by Hon. Edward R. Koch, Justice of the Supreme Court of the State of New York, is appended hereto.

The case came on to be heard on March 19th, 1945, before Hon. Bernard L. Shientag, Justice of the Supreme Court of the State of New York. At the conclusion of the trial both plaintiff and defendant moved for judgment. Decision upon this motion was reserved by the Court (R., fol. 111). In its decision (contained in the opinion of Mr. Justice Shientag appended hereto and in the Record, at fols. 304-333), the lower court held that the section in controversy was not void for indefiniteness and was not discriminatory, but that it was an unlawful interference with interstate commerce in a national field in which Congress has enacted detailed appropriate legislation.

Judgment dated June 29th, 1945, was entered upon this decision on July 12th, 1945, declaring that Paragraph 4 of the amendment to Section 327 of the Sanitary Code of the City of New York is unconstitutional, invalid, void and unenforceable in that it is in violation of plaintiff's rights and privileges in interstate commerce, and enjoining the

enforcement of said Paragraph 4 insofar as said Paragraph 4 applies to horseflesh in interstate commerce.

Thereafter the defendants appealed to the Appellate Division of the Supreme Court of the State of New York, which said Appellate Division unanimously affirmed the judgment below without opinion.

Upon appeal by the defendants to the Court of Appeals of the State of New York from the judgment entered on the order of the Appellate Division affirming the judgment of the court below, the Court of Appeals unanimously reversed the judgments in the courts below and directed judgment adjudicating and declaring the rights of the parties in accordance with the views expressed in their opinion.

The opinion of the Court of Appeals is appended hereto and contains the views of the court with respect to the instant case and the *Quaker Oats* case, a companion action tried and argued together with the case herein. It is respectfully submitted that the rulings of the court as expressed in this opinion and decision, were of a nature to bring this case within the statutory provision believed to confer jurisdiction on the Supreme Court of the United States.

In its opinion, the Court of Appeals held that the ordinance complained of with respect to the plaintiff herein, Hill Packing Company, was not in violation of the Federal law under the interstate commerce clause; that the plaintiff herein must follow the ordinance's demands as to decharacterization until the Federal Government announces a definite method of decharacterization; that the ordinance in the meantime continues operative; that the ordinance is definite and certain; was within the legislative competence of the City to enact; was consonant with the requirements of the due process clause and the equal protection

of the law clause; and does not constitute an invalid delegation of the legislative power.

Pursuant to the direction of the Court of Appeals, a judgment was entered in the court below which declared that Paragraph 4 of Section 327 of the Sanitary Code of the City of New York is not being administered in a manner inconsistent with Federal law and may be enforced, and that said Paragraph 4 is sufficiently definite and certain; was within the legislative competence of the City of New York to enact; is consonant with the requirements of the due process clause and the equal protection of the laws clause and does not constitute an invalid delegation of legislative power.

The Questions Are Substantial

A substantial Federal question is involved herein, as clearly appears from the issues raised by the pleadings and from the decisions of all the courts which have passed upon the questions presented in this case. The Court of Appeals of the State of New York has stated in its opinion (appended hereto and reported in 295 N. Y. 527), "The question posed involves the constitutionality of an ordinance of the City of New York governing and regulating the sale of horsemeat intended for animal feed." It has been contended by the plaintiff in all the courts below that the ordinance was in conflict with Federal legislation occupying the same field, thus violating the commerce clause of the Constitution, and that the ordinance violated the due process and equal protection clauses of the Constitution.

Seven justices of the lower courts have sustained plaintiff's contentions, that the ordinance was invalid and unconstitutional. The Court of Appeals of the State of New York has held the ordinance to be constitutional.

Under the provisions of the ordinance complained of the plaintiff is required to "decharacterize" its product which under federal law is approved as "sound, healthful, wholesome and fit for human food", before such product may be "brought into the City of New York, transported or held, kept, stored or offered for sale". The plaintiff, Hill Packing Company, transports substantial amounts of horsemeat into the city for sale and reshipment to points outside the city. The provisions of the ordinance require plaintiff to adulterate and corrupt its product so as to seriously affect its marketability. Not only is such adulteration required by the ordinance, but it is contended that the provisions necessarily compel plaintiff to violate the Federal "Meat Inspection Act" (34 Stat. 674), the "Horsemeat Act" (41 Stat. 421), and the Regulations promulgated thereunder.

Furthermore, if the ordinance remains operative and the precedent set by the City of New York were to be followed by other municipalities throughout the various States of the Union, each with differing requirements as to decharacterization, plaintiff would be unable to transport and sell its product in interstate commerce. That the enforcement of the ordinance has already injured and will seriously injure plaintiff in its business appears from the testimony. Such testimony shows, among other things, that after the enactment of the statute, and until the issuance of the temporary injunction, the sale of plaintiff's horsemeat in the City of New York decreased in volume by one-half (R., fol. 177).

It is thus respectfully represented that for the foregoing reasons the questions involved in the appeal to the Supreme Court of the United States are of a substantial nature.

It is urged that the appeal herein should be entertained upon the well established principles that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not

debatable and utterly lacking in merit". *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258, 55 S. Ct. 197, 202.

Respectfully submitted,

ARNOLD J. BROCK,
Attorney for Hill Packing Company,
Plaintiff and Proposed Appellant.

APPENDIX "A"

Opinion of the Court of Appeals of the State of New York

(Reported in 295 N. Y. 527)

HILL PACKING COMPANY, *Respondents,*

vs.

CITY OF NEW YORK, et al., *Appellants*

QUAKER OATS COMPANY, *Respondent,*

vs.

CITY OF NEW YORK, et al., *Appellants*

Decided July 23rd, 1946

Appeal, in the first above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1946, unanimously affirming a declaratory judgment of the Supreme Court in favor of plaintiff rendered by the court after a trial at Special Term (Shientag, J.; opinion 185 Misc. 238).

Appeal, in the second above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1946, unanimously affirming a declaratory judgment of the Supreme Court in favor of plaintiff rendered by the court after a trial at Special Term (Shientag, J.).

FULD, *J.:*

In each of these actions for declaratory judgment, the question posed involves the constitutionality of an ordinance of the City of New York governing and regulating the sale of horse meat intended for animal feed. The courts below held it invalid as an unlawful interference with interstate commerce.

In 1943, paragraph 4 of section 327 of the Sanitary Code of New York City was amended to read as follows: "4.

Horseflesh, whether alone or combined with other ingredients, intended for animal feed shall not be brought into The City of New York, transported, or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horseflesh sold and transported to the New York Zoological Society or the Park Department of The City of New York." Violation of its provisions is punishable as a misdemeanor (Penal Law, § 1740; New York City Charter, § 558, subd. c; New York City Administrative Code, § 564-6.0), and, in addition, perhaps subjects the offending product to confiscation (Sanitary Code, § 137).

Both the Hill Packing Company and the Quaker Oats Company are engaged in the preparation of horse meat and in its sale throughout the country—the former from its plant in Kansas, the latter from its factory in Illinois. The product of the Hill Company, frozen and packaged in cartons, is intended for both animal use and human consumption; the product of the Quaker Oats Company, known as "Ken-L-Ration," packaged in hermetically sealed containers, is sold only as dog food. Labels on each company's product proclaim it horse meat and announce that the product has been inspected and approved by the Federal Government.

The Hill Company was advised by the city's department of health that it would have to decharacterize its product by adding either "ground bone" or some other ingredient, such as cod liver oil, coal tar dye, granular charcoal, or some harmless vegetable coloring. The city had advised the Quaker Oats Company that it might decharacterize its product by adding ground bone—as the concern indicated it planned doing—or by some other method.

It is well established that the commerce clause does not itself preclude a State—or municipality (Cuyahoga River Power Co. *v.* Akron, 240 U. S. 462)—from enacting legislation, in the exercise of its police power, regulating matters which affect interstate commerce. (Stone, C. J., concurring, Hill *v.* Florida, 325 U. S. 538, 544; Southern Pacific Co. *v.* Arizona, 325 U. S. 761, 766-767.) Equally settled is the rule that, even if the Federal Government has legislated in a

particular field, local regulation in that field is not necessarily prohibited unless national uniformity is essential. The State or municipal statute will be stricken only if—in terms or in practical administration—it conflicts with the Federal law or infringes on its policy. (Southern Pacific Co. *v.* Arizona, supra, at p. 766; Hill *v.* Florida, 325 U. S. 538; Union Brokerage Co. *v.* Jensen, 322 U. S. 202; Cloverleaf Co. *v.* Patterson, 315 U. S. 148; Allen-Bradley Local *v.* Board, 315 U. S. 740; Kelly *v.* Washington, 302 U. S. 1; Townsend *v.* Yeomans, 301 U. S. 441; Gilvary *v.* Cuyahoga Valley Ry. Co., 292 U. S. 57; McDermott *v.* Wisconsin, 228 U. S. 115; Savage *v.* Jones, 225 U. S. 501.)

Differentiation between cases where the assumption of Federal powers is exclusive and where it is not, is narrow, but the line has been drawn by the Supreme Court in a number of closely comparable cases dealing with the constitutionality of local legislation governing the preparation and sale of foodstuffs.

In Savage *v.* Jones (supra, 532) it appeared that the Federal law prohibited interstate shipments of food for domestic animals only if misbranded by bearing "any statement, design or device * * * false or misleading". Indiana enacted a statute which went further; it required that there be attached to every package of the article, offered for sale in the State while in interstate commerce, a tag or label specifying the ingredients of the foodstuff. The court held the State statute constitutional and wrote (225 U. S., at p. 532): "Congress has thus limited the scope of its prohibitions. *It has not included that at which the Indiana statute aims.* Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis?" (Emphasis supplied.)

However, in McDermott *v.* Wisconsin (supra) the State act was held invalid, since, according to the court, Wisconsin prohibited that which the Federal Government sanctioned. In that case, it appeared that, under the Pure Food and Drugs Act, the government permitted a product to be

sold simply labeled "Corn Syrup with Cane Flavor." The State enacted a law which, proscribing any other "designation or brand on the package," required glucose mixtures to be labeled "Glucose flavored with" the flavoring material. Accordingly, the State condemned a mixture bearing the label "Karo Corn Syrup" "10% Cane Syrup, 90% Corn Syrup," although, as indicated, it met the requirements of the Federal authorities. In ruling that the State could not require a label on articles in interstate commerce different from that which the Federal Government considered proper, the Supreme Court declared (228 U. S., at p. 133): "Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, *we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce*, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." (Emphasis supplied.)

In the *Cloverleaf Company case* (supra) the petitioner was engaged in manufacturing renovated butter from packing stock butter. The Federal legislation subjected the business of making such butter to inspection, regulation, and condemnation of the final product if unfit for human consumption. Though requiring inspection of the raw material—packing stock butter—the Federal statute did not provide for its condemnation or seizure. Alabama enacted a regulatory law of its own which specifically empowered one of its officials to seize and condemn packing stock butter being held for renovation. Noting a conflict in that the State condemned what the government permitted, the court held the State legislation unconstitutional and said (p. 169): "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and

while federal enforcement deemed it wholesome, *would not only hamper the administration of the federal act but would be inconsistent with its requirements.* Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject." (Emphasis supplied.)

Turning to the case at hand, it is our conclusion that the local provision is inconsistent with the requirements of the Federal law, for, as we view it, the city forbids to interstate commerce what the government has authorized. In reaching that decision, we consider the Federal law, not as it read at the trial, but as it reads today in its amended form (Civ. Prac. Act, §344-a, subd. A, par. 5; see Graybar Elec. Co. *v.* New Amsterdam Cas. Co., 292 N. Y. 246, 250), since rights and other legal relations are to be determined as of the time they are disclosed. As amended, the pertinent portion of the regulation provides (Code Fed. Reg., Supp. 1945, tit. 9, §268.12, par. [c]: "(C) Dog food or other animal food prepared, in whole or in part, from materials derived from cattle, sheep, swine, goats or horses, shall be distinguished from articles of human food, so as to avoid the distribution of such animal food as human food. *To accomplish this, labeling of hermetically sealed, conventional retail size containers as, for example, 'dog food' will be considered sufficient.* If not in such containers, the product must not only be properly identified, but it must be of such character or so treated (denatured or decharacterized) as to be readily distinguishable from an article of human food. Dog food shall not be represented as being a human food." (Emphasis supplied.)

The claim of conflict before this new regulation was promulgated rested, essentially, on the possibility that adding coloring matter or employing another method of decharacterization demanded by the city might offend against the Federal law. With the new regulation in force, however, there is no need to speculate about potential and hypothetical conflicts. The local statute insists upon the addition of harmless coloring or other means of decharacterization—permits the use of hermetically sealed con-

tainers, accompanied by appropriate labeling. Here we have a conflict, actual and open, on the very face of the two provisions.

The point is made, though, that the city has never withheld its consent to the use of hermetically sealed containers. That is immaterial. The ordinance endows the health authorities with no power to grant permission to use them. The ordinance is explicit; the product must "by harmless coloring or otherwise," be decharacterized. The term, though unusual and somewhat inartistic, clearly signifies some alteration of the product sufficient to change its character. Packing horse flesh in a hermetically sealed container cannot alter its character. While it may achieve the purpose for which decharacterization is required, it is not decharacterization.

Quite obviously, the ordinance does not supplement the Federal prescription; rather, it infringes upon it. Simply put, the government sanctions the use of hermetically sealed containers; the city adds a further requirement and burden. As expressed in the Cloverleaf case (supra, p. 158) and the McDermott case (supra, 133) "to permit such regulation as is embodied in this statute is to permit" a city "to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of the Federal law."

The inconsistency affects the Quaker Oats Company directly, since it markets its dog food in sealed containers. It is of no consequence that the company was not directed to alter its product. The ordinance is on the books and permits the enforcing agency no alternative, no discretion. It demands that the product be decharacterized, even though in hermetically sealed containers. Failure to comply with the provision calls for criminal punishment and other penalties. Regardless of the temper of the enforcing authority, regardless of its inclination, the ordinance places the product of the Quaker Oats Company, as well as its management, in jeopardy and gives rise to the essential "controversy." Under such circumstances, action for declaratory judgment and for an injunction properly lies. (Acorn Employment Service, Inc., *v.* Moss, 292 N. Y. 147,

153; cf. Good Humor Corp. *v.* City of New York, 290 N. Y. 312.) As Judge Loughran declared in the Acorn Employment case (p. 153): "We believe the Corporation Counsel is mistaken in his assumption that such commands can be reviewed only upon a showing of actual or imminent detriment resulting therefrom. (See Columbia System *v.* U. S., 316 U. S. 407, 417.)"

With respect to the Hill Packing Company, however, the situation is different. The conflict noted in the other case is not here present, for the Hill Company's foodstuff is not contained in hermetically sealed containers. Both under Federal and local law, it is required to decharacterize its product. If the decharacterization features of both controls be identically administered, the Hill Company will have no cause for complaint. Insofar as consistent, both statutes may coexist; the municipal agency may enforce its local law "at least until such time as it is ousted" by the Federal authorities exercising their own paramount jurisdiction. (Matter of Davega-City Radio *v.* Labor Board, 281 N. Y. 13, 24.) We need not now consider at what point the local department of health would be displaced, for, as stated in the Davega-City Radio case (supra) it "is sufficient that in the present case" the Federal department "has not acted" (p. 24).

That does not, however, mean that plaintiff Hill Packing Company is not entitled to a declaratory judgment. (Cf. Rockland Light and Power Co. *v.* City of New York, 289 N. Y. 45.) The potentiality of conflict in administration, particularly in view of the city's insistence upon compliance with the command of the ordinance, justifies a declaration of rights. As indicated, though, such a declaration may not invalidate the ordinance in advance of its being administered in a manner inconsistent with Federal law. Accordingly, the Hill Company must follow the ordinance's demands as to decharacterization—at least until the Federal Government announces a different method of decharacterization. In the meantime, the ordinance continues operative.

The other objections urged against the ordinance lack substance. Clearly, as Special Term ruled, the ordinance is sufficiently definite and certain; it was within the legis-

lative competence of the city to enact; it is consonant with the requirements of the due process clause (People *v.* Blanchard, 288 N. Y. 145; People *v.* Arlen Service Stations, 284 N. Y. 340; Carolene Product Co. *v.* United States, 323 U. S. 18; Nat. Fertilizer Assn. *v.* Bradley, 301 U. S. 178; Hygrade Provision Co. *v.* Sherman, 266 U. S. 497; Heath & Milligan Co. *v.* Worst, 207 U. S. 338; Plumley *v.* Massachusetts, 155 U. S. 461), and the equal protection of the laws clause (People *v.* Teuscher, 248 N. Y. 454; Matter of City of New York [Bronx River Parkway], 284 N. Y. 48; Matter of Stracquadanio *v.* Department of Health, 285 N. Y. 93); and it does not constitute an invalid delegation of legislative power. (Yakas *v.* United States, 321 U. S. 414; Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381; United States *v.* Grimaud, 220 U. S. 506.)

Accordingly, insofar as the contention under the commerce clause is concerned, the ruling in the Quaker Oats Company case should be affirmed; the ruling in the Hill case should be reversed, and judgment directed adjudicating and declaring the rights of the parties in accordance with the views set out above.

The judgment in the Quaker Oats case should be affirmed, with costs. The judgments in the Hill Packing Company case should be reversed and judgment directed adjudicating and declaring the rights of the parties in accordance with the views expressed in this opinion, with costs in all courts.

Loughran, Ch. J., Lewis, Conway, Desmond and Thacher, JJ., concur; Dye, J., taking no part.

APPENDIX "B"

Opinion of Hon. Bernard L. Shientag, Justice of the Supreme Court of the State of New York, Rendered After Trial.

(Reported in 185 Misc. 238)

Hill Packing Co. v. City of N. Y.— This action is one for a declaratory judgment adjudicating that an amendment to section 327 of the Sanitary Code of the City of New York, adopted by the board of health on August 10, 1943, is un-

constitutional. The amendment in question constitutes paragraph 4 of section 327, and reads as follows: "4. Horse flesh, whether alone or combined with other ingredients, intended for animal food, shall not be brought into the City of New York, transported, or held, kept, stored, or offered for sale, or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York."

An application which was made by the plaintiff for a temporary injunction was granted by Mr. Justice Koch, sitting at Special Term, on June 21, 1944 (Hill Packing Co. v. City of N. Y., 182 Misc. 742). In a carefully reasoned opinion he held that the amendment was unconstitutional on the following grounds: that it was indefinite; that it was discriminatory; that it was violative of due process and was not justifiable under the police power; and that it was an unlawful interference with interstate commerce. No appeal was taken from that decision.

The conclusions I reach after trial are as follows: 1. The amendment in controversy is not void for indefiniteness. To be sure, "decharacterization" is a coined word and does not seem to carry any prior scientific or technical meaning. The object of the section, however, is apparent: To require some physical treatment of the horse meat that will prevent its confusion with beef. One method of so doing is specifically mentioned: harmless coloring. The fact that the board of health may allow alternative methods of "decharacterization" does not taint the requirement with indefiniteness or uncertainty (Connally v. General Const. Co., 269 U. S. 385, 391; Whitney v. California, 274 U. S. 357; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Omaechevarria v. Idaho, 246 U. S. 343, 345; People, &c., v. Grogan, 260 N. Y. 138).

2. The amended section is not discriminatory. There is no discrimination against interstate commerce. An exception is made for horse flesh sold to the Zoological Society or to the park department. This, on its face, is a reason-

able classification, in view of the object of the provision, which is to prevent the perpetration of fraud in the sale of horse meat.

3. The amended section is an unlawful interference with interstate commerce, in a national field, in which Congress has enacted detailed appropriate legislation. It will be assumed for the purpose of this decision that unless limited by the exercise of federal power, under the commerce clause, the municipality acting under the authority delegated to it by the state had the power to enact the amendment to the Sanitary Code in controversy. The requirement of due process may be satisfied and still there may be an unlawful interference with interstate commerce. A state law may be good under due process and bad as against interstate commerce (Leisy v. Hardin, 135 U. S. 100). Moreover, "it appears now that there is a difference as to presumption of validity, at least where economic interests are involved, namely, that it runs against validity in commerce law cases, but in favor of validity in due process cases" (Noel T. Dowling, Interstate Commerce and State Power, 27 Va. Law Review, 1, 21, citing McCarroll v. Dixie Greyhound Lines, 309 U. S. 176).

The purpose of the amendment in question is not to prohibit the sale of horse flesh for animal or for human consumption. It is specifically conceded that horse flesh is just as nutritive and as healthful as beef. True, the thought of eating horse flesh is revolting to many; it is also cheaper than beef, and hence the state and municipality have an interest in preventing confusion of the two products. "Decharacterization" of horse flesh was required not to protect the public health, but to prevent the deception of the public. As the health commissioner himself points out, the purpose of the law is "that horse flesh cannot be sold to the consumer without his knowledge." "Horse flesh," he says, "is one kind of food that the city is not going to permit to be foisted upon an innocent and unsuspecting public. To prevent this fraud and deceit, the law requires decharacterization."

The plaintiff's products are transported in interstate commerce and their sale in New York is an incident of

interstate commerce (Savage v. Jones, 225 U. S. 501, 520). More than this, every operation of plaintiff's packing plant, in another state, is under the constant direction and control of the officials and inspectors of the Bureau of Animal Industry, a branch of the United State Department of Agriculture. The plaintiff's products are labelled "horse meat" and, except when ground with bone, are stamped by the federal agency as fit for human consumption. All live horses are inspected before slaughter; the meat is again inspected after slaughter; and all carcasses and parts of carcasses are similarly inspected and only those which are passed by the officials and stamped in accordance with the United States laws and regulations issued thereunder are packed and transported and sold.

The Meat Inspection Act of 1906 regulates the use in interstate commerce of any meat and meat food products (34 Stat. 674). By Act of Congress approved July 24, 1919, this Meat Inspection Act was amended by what is known as the Horst Meat Act to include, within the scope of its provisions and the regulations promulgated thereunder, horse meat and horse meat products. Pursuant thereto the most detailed regulations were promulgated by the United States Department of Agriculture. By those enactments the Federal Government has set up a complete and comprehensive scheme governing the processing, labelling, transportation and sale of horse meat in so far as it is an article of interstate commerce.

Congress having acted in this field, the question is, what power, if any, is left to the various states and municipalities? What a state may do in a field of commerce, which is national in its character, in the absence of congressional action, in the face of congressional action, or by express congressional permission, has been the subject of much litigation. No attempt will be here made to harmonize or even to summarize the decisions of the United States Supreme Court on this subject. The effect of the commerce clause on the power of the states to regulate interstate commerce is the subject of a learned article by Professor Noel T. Dowling, of the Columbia Law School, in which he seeks to find an underlying philosophy in the decisions of the Supreme Court of the United States in this field. In

that article there is to be found a painstaking analysis of the important cases on the subject (Interstate Commerce and State Power, 27 Va. Law Review, 1). Mr. Justice Stone in South Carolina *v.* Barnwell Brothers (303 U. S., 177, 185) said that "it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation, in the absence of Congressional action, has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints" (see also Graves *v.* N. Y. ex rel. O'Keefe, 306 U. S. 466, 477, N., 1; United States *v.* Darby, 312 U. S., 100, 119, and cases cited).

Here the field of commerce has been determined to be national in character; Congress has legislated with respect to it with the utmost particularity and has not seen fit, by express legislation, to remove the impediment to state control as it did for the sale of liquor, or convict-made goods (Leisy *v.* Hardin, 135 U. S., 100, 109; Clark Distillery Co. *v.* West Overland RR., 242 U. S., 111; Whitfield *v.* Ohio, 297 U. S., 431). Perhaps the leading federal case applicable here is Collins *v.* New Hampshire (171 U. S., 30), where the Supreme Court of the United States held that a statute of New Hampshire prohibiting the sale of oleomargarine, as a substitute for butter, unless it were of a pink color, was invalid as an unlawful interference with the freedom of interstate commerce.

Even in a field of commerce, national in character, which Congress has affimatively entered by legislation, the state is not entirely excluded from action. The tendency of the cases has been to recognize that both the state law and the federal law may prevail provided they are not inconsistent; if they are in conflict the federal law has precedence. Just how far a state may go is not clearly defined by the cases. All that can be said is that there seems to be a trend to take a more realistic view of the doctrine of "Congressional preemption," and to consider the balancing of national and of state interests in the field. Has a state under its reserved police power really attempted to encroach upon the national

prerogative? Has Congress spoken in such a way as to "silence state action" on the subject? Discrimination against commerce will, of course, not be tolerated, but it has frequently been held that a state has a certain residual power fairly to regulate products of interstate commerce where such regulation is reasonably required by considerations of public health and safety or to prevent fraud and deception (see for example Smith *v.* St. Louis & S. W. Ry., 181 U. S., 248; Rasmussen *v.* Idaho, 181 U. S., 198; Patapsco Guano Co. *v.* North Carolina, 171 U. S., 345, 357, and the cases cited in South Carolina Highway Dept. *v.* Barnwell Bros., 303 U. S., 177, 185, 191; California *v.* Thompson, 313 U. S., 109, 114; Savage *v.* Jones, 225 U. S., 501).

The extent and the particularity of federal legislation on the subject has a most important bearing on the scope of the state's power to act. Congress may leave part of the subject open to state action. Congress by its legislation may occupy only a limited field, in which event the state under its reserved police power may be free to act as to the remainder in a manner that will not conflict with the federal legislation on the subject. As has heretofore been indicated, Congress has initiated the most detailed legislation with respect to horse meat and a federal agency, pursuant to Congressional authorization, has adopted a closely knit body of regulations not only in the interests of the public health, but to prevent fraud and deception. The scope of the state's action relating to the same subject matter is therefore greatly restricted. For example, the regulations of the United States Department of Agriculture, which have the force of law, provide that no coloring matter may be injected except such as the department considers harmless and these "only with the approval of and in such manner as may be designated by the Department."

Unquestionably, the purpose behind the amendment is a good one. The record shows the existence of a real evil to be guarded against. There have been a number of instances where horse flesh has been fraudulently sold as beef. This is an offense, and those detected have been punished; but such detection is fraught with many difficulties. There is no doubt as to the power of the state or the municipality to adopt reasonable measures designed to prevent the per-

petration of a fraud on the consuming public in connection with the sale of food products, even if no question of public health is involved (cf. Hygrade Provision Co. *v.* Sherman, 266 U. S., 497, upholding the constitutionality of sections 435 and 435-a of the Penal Law dealing with false labels and misrepresentations in the sale of food products and the sale of Kosher meat and meat preparations).

Clearly, despite Congressional action in this national field, the city would have the right to inspect horse flesh brought here from other states, and to require a permit for the sale of horse flesh; it could require the most detailed records to be kept by wholesalers and dealers in horse meat here; it could prohibit the sale of horse flesh in any establishment where other meat products intended for human consumption are kept or offered for sale; it could require labels and signs to prevent the likelihood of deception or of confusion. These requirements are all embodied in section 327 of the Sanitary Code, and their constitutionality is not challenged in this action. Perhaps even more stringent requirements may be imposed along these lines and wholesalers held to stricter accountability, both for the improper and fraudulent diversion of their product by those to whom they sold it.

But there is a distinct limit to the proper sphere of state action in this field. The challenged amendment to the Sanitary Code constitutes a direct impediment to the use of horse flesh in a manner specifically authorized by federal law. The Sanitary Code amendment makes a person selling horse flesh guilty for doing something which Congress has specifically permitted him to do. The requirements of the amendment materially obstruct the exercise of rights conferred by the federal legislation.

For example, the requirement artificially to color the horse flesh is in direct conflict with the federal regulations that horse flesh shall not be artificially colored, except with the approval of the federal agency. If it is sought to require a certain amount of bone to be ground with the horse flesh, that would be in direct conflict with the specific authorization of a federal agency to sell the horse flesh, passed and approved by it, without any bone content. Indeed to require a certain percentage of ground bone con-

tent would make the horse flesh unfit and even dangerous for human consumption.

The views here expressed find support in the most recent decision on this general subject handed down by the Supreme Court of the United States on June 11, 1945, in Hill *v.* State of Florida (No. 811, October Term, 1944). There the court held that certain provisions requiring business agents of labor unions to be licensed and requiring every local labor union to file a report with the secretary of state were invalid as an intrusion upon the federal policy and scheme concerning labor unions set forth in the Wagner Act. The court in the prevailing opinion said: "Our holding is that the National Labor Relations Act and Sections 4 and 6 of the Florida Act as here applied cannot 'move freely within the orbit of their respective purposes without infringing upon one another' (Union Brokerage Co. *v.* Jensen, 322 U. S. 203, 207)."

So it may be said with equal force in the case at bar, that a state or municipality to require the decharacterization of horse meat which has previously been approved as fit for human consumption pursuant to federal legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (Hines *v.* Davidowitz, 312 U. S. 52, 67; Cloverleaf Butter Co. *v.* Patterson, 315 U. S. 148; Napier *v.* Atlantic C. L. R. R., 272 U. S. 605).

The requirement for decharacterization is not only invalid under the prevailing view in Hill *v.* State of Florida (supra) but it is in conflict with the tests laid down in the dissenting opinion in that case.

A municipality may not therefore in regulating the sale of goods in interstate commerce, so as to prevent fraud and deception, require a change in the natural physical character of an unadulterated product declared to be a healthful, legitimate article of food moving in interstate commerce by a federal agency acting pursuant to congressional authorization. If there is to be a valid requirement for decharacterization of horse flesh moving in interstate commerce it must be as the result of co-operative and not conflicting state and federal action on the subject.

Judgment is accordingly directed in favor of the plaintiff for the relief demanded in the complaint. Settle judgment in accordance with the foregoing determination.

APPENDIX "C"

Opinion by Hon. Edward R. Koch, Justice of the Supreme Court of the State of New York, upon Motion Granting Temporary Injunction.

(Reported in 182 Misc. 742)

Hill Packing Co. v. *City of New York, et al.*—This is a motion for a temporary injunction during the pendency of this action, enjoining and restraining defendants, and each of them, their agents, servants and employees, from taking any steps to enforce section 327 of the Sanitary Code of the City of New York, as amended in the month of August, 1943, as against the plaintiff, a dealer in horse meat, or the products of the plaintiff, both in transport from the place of business of the plaintiff to the State of New York and to the City of New York, and the sale and disposition thereof within the State of New York and the City of New York until the entry of final judgment, &c.

Section 327 of the Sanitary Code, as amended, reads as follows: "Section 327: Slaughtering of Horses and Sale of Horse Flesh Regulated. 1. The business of slaughtering horses shall not be conducted in the City of New York. No horse flesh shall be brought into, transported or held, kept or offered for sale in said city without a permit therefor issued by the board of health or otherwise than in accordance with the terms of said permit and the regulations of said board. Such permits when issued shall specify 'For Animal Consumption' or 'For Human Consumption.' 2. No carcass or part of a carcass of a horse shall be brought into the City of New York or held, kept, sold, offered for sale, or given away in said city until it shall have been inspected and passed as fit for human food by a duly-authorized inspector of the United States Department of Agri-

culture, and shall have been marked, stamped or branded as having been so inspected and passed, or in the case of parts of a carcass unless such parts shall have been cut from a carcass or part of a carcass which had previously been inspected and passed and so marked, stamped or branded as hereinbefore provided. 3. Horse flesh shall not be used as an "ingredient of or in the preparation of any mixed food intended for human consumption. 4. Horse flesh, whether alone or combined with other ingredients intended for animal feed, shall not be brought into the City of New York, transported or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring, or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York."

The plaintiff contends that the ordinance is void, both in so far as it attempts to regulate the sale of horse flesh for human consumption, and also as it attempts to regulate the sale for animal consumption, but seeks an injunction only as it affects the transportation and sale of horse flesh for animal consumption, inasmuch as the plaintiff has not in the past, nor is now, engaged in selling horse flesh for human consumption within the City of New York. The plaintiff contends that the ordinance is invalid because it places an undue burden on interstate commerce in connection with an article of commerce which the United States Government, through the bureau of animal industry and the department of agriculture, has declared to be fit for human consumption; that it is invalid because it is discriminatory because of the provision in subdivision 4 of section 327 providing that the section shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York; that the ordinance is invalid because of idefiniteness in that it provides that "horse flesh must be decharacterized by harmless coloring matter or otherwise in a manner and with materials satisfactory to the Department of Health"; that it is invalid because it is not in reality a licensing statute but is in effect a statute prohibiting the sale of horse meat for

human consumption, because on plaintiff's application for a license it was advised by the Board of Health that "it was decided that the department would not consider applications to sell horse flesh for human consumption"; that it is invalid because it bears no reasonable relation to health and is therefore not within the police power of the Board of Health of the City of New York.

The moving papers establish that the plaintiff has substantial property rights which are affected by the section and is one of the largest companies engaged in the slaughtering, sale and distribution of horse flesh, both for human and animal consumption in the United States; that it sells its products throughout various states in the Union and in foreign countries. The plant of the plaintiff is located in Kansas and the horse flesh, to the amount of hundreds of thousands of pounds, is shipped to the City of New York after having been frozen at plaintiff's plant in Kansas, packed into cartons, remaining in its frozen state until it is distributed from the storage plant in the City of New York in the original package.

There are three types of this frozen horse meat: (1) Chunks of meat; (2) ground meat, and (3) ground meat mixed with ground bone. As to types 1 and 2, the cartons bear the following legend: "U. S. Inspected and passed by Department of Agriculture Est. E-83."

The plaintiff contends, and it is not contradicted, that the effect of this legend is that the United States Department of Agriculture, Bureau of Animal Industry, has pronounced the horse meat fit for human consumption.

The ground horse meat which is mixed with bone (number 3 above referred to) does not bear the legend above set forth, but merely one which indicates that the article has been prepared in an establishment operating under federal meat inspection.

The plaintiff argues that the indefiniteness of the section is indicated by the fact that various measures approved by the board of health for decharacterization of the horse meat were later rescinded and other methods substituted, and further that the regulations adopted by the bureau of animal industry provide that no products shall contain any dye, preservation, or added chemical except as permitted,

by certain other sections of the regulations, and that all these sections provide that any added matter, even harmless coloring matter, must be with the approval of and in such manner as may be designated by the bureau of animal industry. That, by virtue of the indefiniteness of the ordinance in respect to defining exactly what is meant by decharacterization, regulations of the board might well require some form of decharacterization which might not be approved by the bureau of animal industry, thereby rendering impossible the transportation of plaintiff's product in interstate commerce.

Plaintiff's moving papers contain affidavits and other matter indicating that horse meat is equal in nutritive value to beef and other meats used for human consumption, and that it is used by a great many people, and that it has also been used very largely as a diet for dogs and other animals for many years. Plaintiff alleges that for the last seven years it has been distributing horse meat in the State of New York and that its business was steadily increasing, and that since the date of the enactment of the ordinance—section 327—the business has decreased to approximately one-half of its former volume.

The defendants point out that the plaintiff is not restricted in the sale of horse flesh to customers outside the City of New York, provided shipments are made by common carrier; they are also not restricted to sales to United States Government agencies; they may sell horse flesh with bone as they did prior to the enactment of the new regulations, and they may also sell horse flesh decharacterized with any of the materials suggested by the health department, and argue that the rights of the plaintiff have not been invaded; that the section protects the health of the inhabitants of the City; that the City had the power to pass the legislation, and that under the police power the wisdom of its action cannot be questioned.

There is no doubt that the state has power to pass laws protecting the health of the public and that the state may delegate that power to municipalities, and, further, that the Sanitary Code is an exercise of the police power and has the force of law (Lieberman *v.* Van de Carr, 199 U. S., 552; People ex rel. Lodes *v.* Department of Health, 189 N. Y.,

187; People, &c., French Bottling Works, Inc., 259 N. Y., 4; People, &c., *v.* Kehoe, 246 N. Y., 592). It is settled law that in the absence of illegality, arbitrariness or capriciousness the provisions of the Sanitary Code should be sustained by the court, and there is a presumption of constitutionality which must be overcome by the plaintiff (Pacific States Co. *v.* White, 296 U. S. 176; Matter of Stubbe *v.* Adamson, 220 N. Y. 459). While, with certain exceptions, the City has no power to legislate with reference to a product sold in interstate commerce, it still has regulatory powers with relation to articles affecting the public health, and the police power extends to imposing restrictions having reasonable relation to preserving the public health. The nature and extent of such restrictions are matters for legislative judgment and are within the power of the state unless palpably unreasonable and arbitrary.

The issues presented are substantial. Horse flesh is a food product and a lawful article of commerce. As such any statute which attempted to exclude it from importation into a state from another state where it was either processed or grown, would be violative of the United States Constitution (Shollenberger v. Pennsylvania, 171 U. S. 1). While a state and, a fortiori, a self-governing municipality, has power to regulate the introduction of a food product, such regulation must be enacted for the purpose of insuring the purity of the article, to prevent fraud and deception, or to promote honesty and disclosure in relation to the production and selling of the article (Shollenberger v. Pennsylvania, supra; People, &c., *v.* Guiton, 210 N. Y. 1). The regulating statute, however, may not impose such conditions which if complied with will effectually amount to a prohibition (Collins v. New Hampshire, 171 U. S. 30). In determining whether a statute is prohibitory or not, the "direct and necessary result of a statute must be taken into consideration, even if that result is not in so many words either indicated or distinctly provided for. In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect" (Collins v. New Hampshire, supra, p. 34; Henderson v. Mayor of New York, 92 U. S. 259; Morgan SS. Co. v. Louisiana, 118 U. S. 455). Laws passed by states in the exercise of their

police powers which are not in conflict with the laws of Congress upon the same subject, are valid laws even though incidentally affecting interstate commerce (Silz v. Hesterberg, 211 U. S. 31). It follows, therefore, that plaintiff's products may not be excluded from the City of New York, but that regulatory ordinances may be enacted concerning them provided their effect is not prohibitory. The regulations heretofore set forth affect a product which the United States Government, through its Bureau of Animal Industry, has designated as fit for human consumption. Section 327 does not seek to regulate the purity of the horse flesh imported for animal consumption and no dispute appears to exist as to the quality of the plaintiff's product. Neither does the section tend to prevent fraud and deception or to promote honesty and disclosure in relation to the plaintiff's product. The plaintiff's product is unquestionably horse flesh, looks like horse flesh in its natural state and is properly marked as is required by the applicable federal regulations. No attempt is made by the plaintiff to pass off its product as something that it is not. The mere fact that horse flesh in its natural state looks like beef is not sufficient reason to compel the plaintiff "to decharacterize" it by the use of a foreign substance such as fish oil, charcoal, dyes, or other methods that might be suggested by the defendant (Collins v. New Hampshire, supra). The applicable federal regulations provide: "No meat product shall contain any substance which impairs its wholesomeness, nor contain, except as permitted by paragraphs 2, 3 and 8 of this section, any dye, preservative or added chemical (paragraph 1). Only harmless coloring matter may be added and then only with the approval of and in such manner as may be designated by the department" (paragraph 3, section 6, regulation 18). To require plaintiff to add a "decharacterizing" agent "satisfactory" to the city's health department, might well result in inability by the plaintiff to meet these provisions in the federal regulations. The language of section 327 is indefinite as to the nature of "decharacterization" which might be required, and being of the nature of a penal statute definiteness is required (People v. Briggs, 193 N. Y. 457). Section 327 therefore would seem to be an improper interference with interstate

commerce and violative of the plaintiff's constitutional rights. A purchaser of horse flesh, even for animal consumption, should not be forced to purchase a discolored or befouled meat unless a compelling reason exists therefor. It is well known that animals are governed by their sense of smell and might refuse to eat meat treated with codliver oil or other "decharacterizing" agents. Animal owners may justifiably object to the unpleasantness and inconvenience of the handling of "decharacterized" horse flesh. The addition of the foreign substance suggested for "decharacterization" might very well excite a prejudice and repugnance to the point of positive refusal to purchase. The decreased sales by the plaintiff of its horse flesh containing ground bone is evidence of this fact. Such a result would make the regulation prohibitory and thus an interference with interstate commerce (Collins v. New Hampshire, supra). The question is presented as to whether the enactment of section 327 was a proper exercise of the police power and as such sustainable, even though it indirectly affects interstate commerce. From affidavits presented on this motion there appears to be little doubt that the plaintiff's horse flesh has found its way into channels leading to human consumption. It must be recognized that there is general public antipathy to the use of horse flesh for human consumption. Whether or not this antipathy is justified, it is not unreasonable to assume that many persons would be disturbed emotionally, perhaps physically, should they learn that they had partaken of horse flesh. To protect the consuming public from being defrauded is important and greatly to be desired. The fact that providing this protection is difficult or arduous does not justify the enacting of a law which is destructive of individual property rights (Good Humor Corp'n v. City of N. Y., 290 N. Y. 312). The fact that wrongdoers might misuse or abuse a proper article of commerce is not sufficient reason to change its real character. If wrongdoing exists it should be attacked directly and the wrongdoers dealt with accordingly. The innocent, however, should not be made to suffer because of the possibility of wrongdoing. It would seem that section 327 has no reasonable relation to the purpose sought to be accom-

plished by its enactment and is therefore unjustified (Slight v. Kirkwood, 237 U. S. 53).

Subdivision 4 of section 327 provides: "Horse flesh * * * shall not be brought into the City of New York, transported or held * * * unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health." To comply with this part of the section the plaintiff would be compelled to perform acts without the City of New York before it could even "transport" its product through the City of New York. While the defendants assert they have not attempted strict enforcement of this provision, the law as enacted makes provision for such enforcement if the defendants so desire. The plaintiff may not be compelled to rely upon the beneficence or laxity of the defendants, but rather should be governed in the conduct of its business by provisions which are understandable and definite. Certainly the defendants have no power to compel an act outside of the City of New York which regulates plaintiff's conduct in conducting its business in interstate commerce. Regardless of the purpose of the defendants in enacting section 327, they have exceeded their authority in an illegal and arbitrary manner not justified by the police powers admittedly resident in them. The remaining contentions of the plaintiff also have merit. Section 327 specifically provides (subdivision 4) "* * * This provision, however, shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York." This exemption is discriminatory in that it favors the New York Zoological Society, a private corporation, and the Park Department of the City of New York over the plaintiff or customers of the plaintiff. The argument urged on behalf of the defendants that horse flesh sold to an agency or department of government will not reach the hands of the consuming public, and therefore need not be decharacterized, is specious. If wrongdoing is to be guarded against, no person or group should be exempt from proper supervision.

The motion for a temporary injunction is therefore granted. Settle order.

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